

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Time Warner Cable Inc.)	CSR 7799-E
)	
Petition for Determination of Effective)	
Competition in 105 Franchise Areas in Ohio)	

MEMORANDUM OPINION AND ORDER

Adopted: October 14, 2010**Released: October 14, 2010**

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Time Warner Cable Inc., hereinafter referred to as “Petitioner,” has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(1-2), and 76.907 of the Commission’s rules for a determination that Petitioner is subject to effective competition in those communities listed on the Attachments hereto and hereinafter referred to as “Communities.”¹ Petitioner alleges that its cable system serving the Communities listed on Attachments A hereto (the “Attachment A Communities”) is subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”)² and the Commission’s implementing rules,³ and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”) and Dish Network (“Dish”). Petitioner also claims to be exempt from cable rate regulation in the Communities listed on Attachment B (the “Attachment B Communities”) pursuant to Section 321(l)(1)(A) of the Communications Act⁴ because the Petitioner serves fewer than 30 percent of the households in those franchise areas. The petition is unopposed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁵ as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission’s rules.⁶ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁷ For the reasons set forth below, we grant the petition based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachments A and B.

¹ By letter dated November 17, 2008, and an e-mail dated October 26, 2010 (10:07 A.M.), Petitioner withdrew approximately 25 Communities from our consideration.

² See 47 U.S.C. § 543(l)(1)(B).

³ 47 C.F.R. § 76.905(b)(2).

⁴ See 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

⁵ 47 C.F.R. § 76.906.

⁶ See 47 U.S.C. § 543(l)(1) and 47 C.F.R. § 76.905(b).

⁷ See 47 C.F.R. §§ 76.906 & 907.

II. DISCUSSION

A. The Competing Provider Test

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”) each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area;⁸ this test is otherwise referred to as the “competing provider” test.

1. The First Part

4. The first part of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.⁹

5. Turning to the first part of this test, it is undisputed that the Attachment A and B Communities are “served by” both DBS providers, DirecTV and Dish, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.¹⁰ The Commission has held that a party may use evidence of penetration rates in the franchise area (the second part of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.¹¹ We further find that Petitioner has provided citations to the DBS providers’ growing subscribership and their web pages to support its assertion that potential customers in the Attachment A and B Communities are reasonably aware that they may purchase the service of these MVPD providers.¹² The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming¹³ and is supported in this petition with reference to channel lineups for both DirecTV and Dish posted on the Internet.¹⁴ Also undisputed is Petitioner’s assertion that both DirecTV and Dish offer service to at least “50 percent” of the households in the Communities because of their national satellite footprint.¹⁵ Accordingly, we find that the first part of the competing provider test is satisfied in the Attachment A and B Communities.

⁸ 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁹ 47 C.F.R. § 76.905(b)(2)(i).

¹⁰ *See* Petition at 4-5.

¹¹ *Mediacom Illinois LLC*, 21 FCC Red 1175, 1176, ¶ 3 (2006).

¹² 47 C.F.R. § 76.905(e)(2); *see also* Petition at 5-7.

¹³ *See* 47 C.F.R. § 76.905(g); *see also* Petition at 6 & n.16.

¹⁴ *See* Petition at 7.

¹⁵ *See id.*

2. The Second Part

6. The second part of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Petitioner asserts that it is the largest MVPD in some of the Attachment A and B Communities and that, in others, both it and the DBS providers have subscribership exceeding 15 percent.¹⁶ Petitioner correctly asserts that, assuming the validity of these subscribership numbers, it is subject to effective competition in the latter Communities. If Petitioner is the largest MVPD there, then the DBS providers' subscribership exceeds 15 percent. On the other hand, if one of the DBS providers is the largest MVPD, then the combined subscribership of Petitioner and the other DBS provider exceeds 15 percent. Either way, the subscribership of the MVPDs other than the largest one exceeds 15 percent.¹⁷

7. Petitioner sought to determine the competing provider penetration in the Attachment A Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association ("SBCA") that identified the number of subscribers attributable to the DBS providers within the Communities on a five-digit zip code basis.¹⁸

8. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,¹⁹ as reflected in Attachment A, we find that Petitioner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Attachment A Communities. Therefore, the second part of the competing provider test is satisfied for each of the Attachment A Communities.

9. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both parts of the competing provider test are satisfied and Petitioner is subject to effective competition in the Communities listed on Attachment A.

B. The Low Penetration Test

10. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition if the Petitioner serves fewer than 30 percent of the households in the franchise area; this test is otherwise referred to as the "low penetration" test.²⁰ Petitioner alleges that it is subject to effective competition under the low penetration effective competition test because it serves less than 30 percent of the households in the Attachment B Communities.

11. Based upon the subscriber penetration level calculated by Petitioner, as reflected in Attachment B, we find that Petitioner has demonstrated the percentage of households subscribing to its cable service is less than 30 percent of the households in the Attachment B Communities. Therefore, the low penetration test is also satisfied as to the Attachment B Communities.

¹⁶ See *id.* at 8-9.

¹⁷ See *Charter Commun.*, 21 FCC Rcd 1208, 1210, ¶ 5 (2006).

¹⁸ Petition at 9, n.25, & Exh. D.

¹⁹ *Id.* at 9, n.25, & Exh. C.

²⁰ 47 U.S.C. § 543(l)(1)(A).

III. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Time Warner Cable Inc., **IS GRANTED** as to the Attachment A Communities and the Attachment B Communities.

13. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to or on behalf of any of the Communities set forth on Attachment A and B **IS REVOKED**.

14. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.²¹

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckert
Senior Deputy Chief, Policy Division, Media Bureau

²¹ 47 C.F.R. § 0.283.

ATTACHMENT A

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COMMUNITIES SERVED BY TIME WARNER CABLE INC.

<u>Communities</u>	<u>CUIDs</u>	<u>CPR*</u>	<u>2000 Census Households</u>	<u>Estimated DBS Subscribers</u>	<u>Time Warner Subscribers</u>	<u>Sum of Subscribers</u>
Allen	OH0442					
	OH0912	33.14%	1260	417.58	456	873.58
Bairdstown	OH2751	23.51%	49	11.52	27	38.52
Ballville	OH2506					
	OH0184	23.36%	2545	594.47	1512	2106.47
Bellevue	OH0030					
	OH2508	23.78%	3332	792.31	2502	3294.31
Bettsville	OH1363	15.69%	298	46.76	154	200.76
Bloomdale	OH2752	51.06%	256	130.71	102	232.71
Bloomville	OH1318	40.41%	366	147.90	213	360.90
Bradner	OH1454	32.09%	445	142.78	204	346.78
Burgoon	OH2225	44.40%	68	30.19	33	63.19
Carey	OH0511	36.20%	1543	558.56	754	1312.56
Cygnat	OH2753	43.53%	211	91.86	112	203.86
Eden	OH2294	18.93%	737	139.49	265	404.49
Elmore	OH1455	35.82%	588	210.63	287	497.63
Fremont	OH2284					
	OH0161	22.19%	6856	1521.12	4350	5871.12
Genoa	OH0911	31.52%	851	268.20	511	779.2
Gibsonburg	OH1456	28.67%	949	272.11	609	881.11
Hopewell	OH0549	15.79%	1084	171.21	332	503.21
Jenera	OH1724	32.32%	95	30.71	49	79.71
Jerry City	OH2750	43.53%	160	69.65	54	123.65
Jerusalem	OH1587	31.45%	1113	350.06	445	795.06
Lake	OH1181	17.02%	4169	709.60	1506	2215.6
Lindsey	OH1471	36.82%	199	73.27	84	157.27
Loudon	OH0551	17.34%	892	154.69	289	443.69
Lyme	OH0459	27.32%	339	92.62	112	204.62
McClure	OH2220	40.44%	285	115.25	141	256.25
Milton Center	OH2218	53.39%	67	35.77	27	62.77
Nevada	OH1249	43.86%	313	137.27	126	263.27
North Baltimore	OH1030	23.51%	1272	299.08	885	1184.08
Pemberville	OH1458	39.71%	541	214.81	325	539.81
Portage	OH0629	36.48%	153	55.82	82	137.82
Rising Sun	OH1361	33.17%	232	76.96	121	197.96
Sandusky	OH0183					
	OH2058	22.19%	1610	357.21	627	984.21
Vanlue	OH2021	37.55%	141	52.94	82	134.94
Walbridge	OH1189	19.36%	1078	208.70	663	871.7
Weston	OH1344	33.25%	638	212.14	305	517.14
Woodville	OH1460	31.71%	786	249.25	530	779.25
York	OH0458	22.20%	920	204.26	397	601.26

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT B

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COMMUNITIES SERVED BY TIME WARNER CABLE INC.

<u>Communities</u>	<u>CUIDs</u>	<u>Franchise Area Households</u>	<u>Cable Subscribers</u>	<u>Penetration Percentage</u>
Adams	OH1040	477	1	0.21%
Amanda	OH2017	383	17	4.44%
Antrim	OH812	490	15	3.06%
Big Lick	OH2018	344	66	19.19%
Big Spring	OH1617	620	63	10.16%
Blanchard	OH1038	414	12	2.90%
Chatfield	OH1368	295	23	7.80%
Clay Center	OH0910	1912	49	2.56%
Cranberry	OH2013	627	29	4.63%
Crane	OH1250	3060	72	2.35%
Crawford	OH2704	1964	77	3.92%
Eagle	OH0871	410	107	26.10%
Eden	OH1811	396	117	29.55%
Freedom	OH1581	1013	34	3.36%
Green Creek	OH0460	3602	735	20.41%
Harris	OH1457	1174	101	8.60%
Jackson	OH1035	374	111	29.68%
Jackson	OH2008	575	164	28.52%
Jackson	OH0550	598	104	17.39%
Madison	OH1037	808	43	5.32%
Middleton	OH2248	956	173	18.10%
Montgomery	OH1582	1686	105	6.23%
Orange	OH2633	498	63	12.65%
Pitt	OH2340	381	16	4.20%
Riley	OH1959	496	4	0.81%
Scipio	OH2015	633	7	1.11%
Seneca	OH1618			
	OH2091			
	OH2293	538	139	25.84%
Sycamore	OH1620	646	52	8.05%
Townsend	OH1960	609	105	17.24%
Tymochtee	OH1619	439	21	4.78%
Union	OH2059	619	52	8.40%
Van Buren	OH1034			
Van Buren	OH2638	353	14	3.97%
Venice	OH2016	731	18	2.46%
Washington	OH2056	1884	84	4.46%
Woodville	OH1580	1244	1	0.08%